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STATUTE.

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Supreme Court of the United States.

OCTOBER TERM, 1972.

No. 72-663.

TURNPIKE REALTY COMPANY, INC.,
Petitioner,
v.
TOWN OF DEDHAM, MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below, Prior Orders of this Court and Jurisdiction.

These matters are adequately set forth in the petition.

Question Presented.

Is there an unconstitutional taking of property when a town includes in a flood plain zoning district land which is subject to seasonal and periodic flooding, when the effect of that zoning is to limit the use of the land to buildings and activities appropriate to its character, and provides an administrative procedure for the exemption of land which is not subject to flooding or not unsuitable because of drainage conditions for an alternative use?

Constitutional, Statutory and By-Law Provisions.

The relevant constitutional, statutory and by-law provisions are set out in the petition (Petition 3, 73-78).

Statement of the Case.

This case involves the exercise by a town, pursuant to state statutory authorization, of the fundamental power to zone land within the town for uses which are appropriate to the character of the land itself and which are designed to preserve the health, safety, convenience, morals or welfare of the town's inhabitants. The town of Dedham, Massachusetts, amended its zoning by-laws in 1963 to create a flood plain district (which included the petitioner's land) and to provide rules for the use of the land in such a district.

The first paragraph of the by-law (Petition 76-78) states its central purpose "to protect the public health and safety, persons and property against the hazards of flood water inundation." Certain other purposes, including protection of the ground water table, avoidance of costs of unsuitable development, and conservation of natural resources, are also stated.

The second paragraph contains the principal use limitations imposed in flood plain districts: no structures may be built in such districts, and the land may be used only for woodland, grassland, wetland, agricultural, horticultural, or recreational purposes which do not involve filling.

The by-law contains two separate special permit provisions. The first, contained in the second and third paragraphs, allows buildings accessory to the permitted uses on approval of the local Board of Appeals. Such buildings must be appropriately designed for exposure to flooding. The second special permit provision, in the fourth paragraph of the by-law, permits exemption of any land in the district

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if the land is shown to be not subject to flooding, or "not unsuitable because of drainage conditions" for otherwise permitted uses, and if it is further found that exemption would not conflict with the purposes of flood plain zoning, including protection of the public health, safety and welfare.

The petitioner owns 61.9 acres of land which are included in the flood plain district. That land is composed of "lowlands covered with marshgrass and scrub growth," and includes two knolls within the marsh area containing 3.2 and .2 acres respectively (Petition 24-25). The trial court specifically found on the basis of extensive expert and other evidence, including a view of the locus, that there was a reasonable basis for the legislative determination that the land was in fact subject to "'seasonal' or 'periodic'" flooding (Petition 39). The evidence showed that the land was subject to flooding both before and after a flood control bascule gate was constructed in 1959 (Petition 16-17, 24-25). The trial court also found that the petitioner was not deprived of all use of its property and that "[a]lthough there was a substantial diminution in value" caused by the imposition of the flood plain zoning, the decrease in value did not constitute an unconstitutional deprivation of property (Petition 42).

Review of the decision of the Land Court by the Supreme Judicial Court is limited to questions of law and the trial court's findings of fact must stand if warranted by the evidence. *Lyon* v. *Parkinson,* 330 Mass. 374, 375 (1953). The Supreme Judicial Court agreed with the Land Court that the evidence showed periodic or seasonal flooding (Petition 24-25), which was not artificially caused (Petition 16-17), and that the evidence did not show such a decrease in value as to constitute an unconstitutional taking of the petitioner's property (Petition 27).

The last three paragraphs of the petitioner's statement of the case (Petition 5) state as facts certain assertions by

the petitioner which were expressly or impliedly rejected by the Land Court and which the Supreme Judicial Court ruled the trial court was warranted in rejecting. Both courts refused to find that the flooding of the petitioner's land was artificially caused (Petition 16-17, 24-25, 52 (denying Petitioner's Request No. 21)), that the primary purpose of the flood plain by-law was improper (Petition 15-16, 52 (denying Petitioner's Requests Nos. 26, 48, 49, 52 and 53)), or that the value of the petitioner's land was decreased 88 per cent by the zoning (Petition 26-27, 42). Finally, the statement that interested developers have been deterred by the flood plain zoning (Petition 9, n. 3) has no foundation in the findings of either court.*

Similarly, the petitioner's statement of the questions presented (Petition 2-3) improperly states as facts portions of evidence which the trial court and the Supreme Judicial Court did not accept.

Argument.

I. The Constitutional Questions Raised by the Petitioner have All been Ruled upon Repeatedly by this Court and were Decided Below in Conformity with the Decisions of this Court.

The exercise of the zoning power to limit the use of land within the flood plain is a comparatively new type of regulation, the importance of which has only recently been generally recognized. It does not, however, raise any legal issues which have not been previously determined by this Court. The exercise of the police power involved in local

* The fact that the petitioner did not develop its land in any way from 1947 to 1963 when the by-law was enacted (Petition 4), suggests that it is the character of the land, not the flood plain zoning, which prevents such development.

zoning regulations was first sustained in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 386-395 (1926). The Court there recognized that modern developments may make necessary restrictions on the use of private property which might a century ago have been deemed unreasonable. 272 U.S. at 387. The effect of changing conceptions of the public welfare was recognized more recently in *Berman* v. *Parker*, 348 U.S. 26, 33 (1954). In that case the Court restated the modern view of the constitutional limitation upon the exercise of the police power as follows (348 U.S. at 32):

> "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . . The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." (Citations omitted.)

These well-established general standards of review were applied by the Massachusetts Supreme Judicial Court in this case (Petition 23-24).

The essential ingredient of the petitioner's claim that it has been denied due process is that an unconstitutional taking of its property has occurred. The only evidence it offered to support this claim was an asserted decrease in market value of the zoned land. The decisions of this Court are clear that comparisons of value are "by no means conclusive" on the question of an unconstitutional taking. *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962). In *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 384 (1926), an asserted decrease of 75 per cent was not found to be an unconstitutional taking, and in *Hadacheck* v. *Sebastian*, 239 U.S. 394, 405, 410-411 (1915), evidence of a claimed decrease of 92.5 per cent was not sufficient.

The reason for not accepting value comparisons as the sole basis for the decision of constitutional issues was stated 85 years ago in *Mugler* v. *Kansas*, 123 U.S. 623, 668-669 (1887): it would permit a property owner to complain that he has been deprived of the benefit of a value which was based on injury to the public interest. The flood plain by-law in this case, as the Supreme Judicial Court held (Petition 19, 25), prevents the petitioner from using the land in ways which would threaten the health, safety and welfare of persons on the land itself, or of others living in areas of slightly higher elevation who would be threatened by increased flooding caused by the misuse of the petitioner's land. The by-law, however, permits the petitioner to use its land in ways which do not have such deleterious consequences (Petition 25-26).

In addition to its central argument that the by-law is unconstitutional because it decreases the value of its land, the petitioner relies on certain ancillary legal issues. It argues that the purpose of the flood plain zoning by-law to protect the community against "costs which may be incurred . . . [from] unsuitable development" is too "narrowly circumscribed" to meet the standards established in decisions of this Court. The case the petitioner cites for that proposition, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), however, relied among other considerations on the potential savings in the cost of local street construction. 272 U.S. at 391. In any event, the Massachusetts court ruled that community-wide expenses, like public works, disaster relief, or injury to others in the community from increased flooding if the petitioner's land were filled, all might be considered in deciding whether a flood plain zoning by-law served the public welfare (Petition 25). That holding is clearly in accord with the broad scope given to the police power in later decisions of this Court. E.g., *Berman* v. *Parker*, 348 U.S. 26, 32 (1954).

The petitioner also complains of the treatment of the two knolls, of 3.2 and .2 acres respectively, which were included in the flood plain district. It states (Petition 9, n. 3) that the Supreme Judicial Court found their inclusion to be inadvertent, when in fact that court only noted that the trial court had concluded that the inclusion "may" have been inadvertent (Petition 28), and went on to support the inclusion in any event. This Court, like the Massachusetts Court (Petition 21), has recognized that zoning must apply to general areas, even if it results in restrictions on particular sites which do not require the limitations. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 387-389 (1926).

The Dedham by-law also contains an administrative procedure for exemption of land which is not in fact subject to flooding or, due to drainage conditions, is not unsuitable for otherwise permitted uses (Petition 21, 28), which adequately protects the petitioner's rights with respect to the knolls. The petitioner chose not to seek exemption of the knolls under that provision, but instead to contest the validity of the entire by-law. Although the Massachusetts statutes (G.L. c. 240, § 14A) permit such a broad challenge to be made (cf. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 386 (1926)), it does not follow that the petitioner's own failure to seek an appropriate administrative remedy can be used as the basis for an argument that the entire by-law is unconstitutional. See *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926). As the Land Court noted, the exercise of the administrative mechanism must be presumed regular until experience proves otherwise (Petition 47). Cf. *In re Groban*, 352 U.S. 330, 334 (1957). In any event, this Court should not exercise its certiorari powers to review the determination of a trial court as to the precise location of a zoning district boundary in Dedham.

Similarly, the petitioner's assertion that there are not sufficient standards for the exercise of the power of the

local Board of Appeals to grant exemptions raises no issue warranting review by this Court. The Massachusetts decisions applied by the Supreme Judicial Court (Petition 22) are clearly in accord with the decisions of this Court with respect to standards for the exercise of delegated authority. E.g., *Berman* v. *Parker*, 348 U.S. 26, 35 (1954).

II. The Issues of Fact Determined by the Courts below Foreclose the Petitioner's Arguments.

Although the petitioner claims to be seeking certiorari from this Court for the review of legal issues, it is actually attempting to obtain review of fact determinations made against it in the trial court and sustained by the Supreme Judicial Court. In the absence of special circumstances (not here present) this Court will not reject state court findings of fact when there is evidential support in the record for such findings. *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160 (1952). While the findings of fact concerning certain issues, such as the change in value of the land, are not as detailed as may be desirable, it is well established that this Court will "assume, so far as the state of the record permits, that [the state courts] . . . adopted such a basis of fact as would most clearly sustain [their] . . . judgment on the federal constitutional issue. *Reinman* v. *Little Rock*, 237 U.S. 171, 180 (1915). This situation is an example of the more general principle that in the absence of specific findings of fact and where the evidence is conflicting this Court will assume findings were made below to support the judgment under review. *McKinley Creek Mining Co.* v. *Alaska United Mining Co.*, 183 U.S. 563, 569 (1902).

The petitioner also argues that it should be permitted to show that certain of the stated purposes of the flood plain zoning by-law, particularly the protection of health and safety, are not actually accomplished by the provisions of the by-law. It erroneously suggests that the Supreme

Judicial Court did not deal with that question (Petition 11). In fact, that court did consider the matter directly and said that the necessity of such zoning to reduce damage to life and property was "unquestionable" (Petition 24). It has been settled for over 60 years in cases of this kind that the factual basis for local legislative judgments, upheld by the state courts, will not be casually disregarded by this Court on review. *Laurel Hill Cemetery* v. *San Francisco,* 216 U.S. 358, 365 (1910). See also *Gorieb* v. *Fox,* 274 U.S. 603, 609 (1927).

In any event, the petitioner has raised its theory concerning the failure of the by-law to achieve its purposes too late. At trial and on appeal, the petitioner's contention was not that the purposes stated in the by-law could not be accomplished by its provisions, but that other purposes were the true motivation for passing the by-law.* This can be readily seen by review of the requests and exceptions which the petitioner designates as preserving the issue (Petition 6, ¶4). The distinction is more than semantic, since the petitioner's position below did not require it to show that the by-law could not achieve its stated purposes, but only to show that some supporters of the by-law emphasized the conservation purposes. As a result, no evidence to show that the by-law would not protect the public health and safety was introduced by the petitioner or reported on appeal. The petitioner has the heavy burden of showing that the by-law's purposes are not achieved by its restrictions. When no evidence to that end is present, the by-law must be upheld. *Goldblatt* v. *Hempstead,* 369 U.S. 590, 596 (1962). The same rule of constitutional adjudication was applied by the Supreme Judicial Court (Petition 23-24).

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* In seeking certiorari, the petitioner is forced to alter its theory, in the face of the well-established line of decisions that ulterior motives of the legislative body will not be considered. *Flemming* v. *Nestor,* 363 U.S. 603, 617 (1960).

III. This Court has Regularly Denied Certiorari to Cases Raising the Issues Contained in this Petition.

Landowners whose property has been subject to zoning restrictions have had little success in obtaining certiorari in cases where, as in this petition, the foundation of their claim to unconstitutional deprivation of property was a decrease in value. In *Consolidated Rock Products Co.* v. *Los Angeles,* 57 Cal. 2d 515, 530, appeal dismissed per curiam for want of substantial federal question, 371 U.S. 36 (1962), this Court declined to hear a case in which it was alleged that the zoning restrictions deprived the owners of substantially all the value of their land. Similarly, in *McCarthy* v. *Manhattan Beach,* 41 Cal. 2d 879, 890-891 (1953), cert. denied, 348 U.S. 817 (1954) (zoning regulation restricting beach front property to recreational uses), although no evidence of actual value changes had been introduced, the essence of the claim was an unconstitutional deprivation of property. See also *St. Paul* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.,* 413 F. 2d 762 (8th Cir.), cert. denied, 396 U.S. 985 (1969).

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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